Attachment Three

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. THOMAS PORTEOUS, JR., United States District Judge for the Eastern District of Louisiana,	)	
Plaintiff,	)	**Civil Action No.**
v.	)	
ALAN I. BARON, Special Counsel, Impeachment Task Force, Committee on the Judiciary, United States House of Representatives, et al.	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY RELIEF

NOW INTO COURT comes plaintiff, G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana ("Judge Porteous"), by and through counsel, and moves this Honorable Court for entry of a temporary restraining order and a preliminary injunction in this matter restraining and enjoining defendants, in their capacity as Counsel to the Impeachment Task Force, from violating Judge Porteous' Fifth Amendment rights by using his immunized testimony in any way, whether direct or indirect, evidentiary or non-evidentiary, in connection with the work of the Impeachment Task Force. In support of this motion, Judge Porteous states as follows:

1. Introduction

The Supreme Court has held a grant of immunity pursuant to Title 18, United States Code, §6002 is coextensive with the protections provided by the Fifth Amendment. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972). The Fifth Amendment's protection against compulsory self-incrimination is not limited to proceedings which are labeled "criminal." The self-incrimination clause has long been held to apply to proceedings of a "quasi-criminal nature" which involve the imposition of punishment on an individual "by reason of offenses committed by him, which though they may be civil in form, are in their nature criminal." *See Boyd v. United States*, 116 U.S. 633-34 (1886); *see also Lees v. United States*, 150 U.S. 476, 480-81 (1893); *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971); and *United States v. Ward*, 448 U.S. 242, 251-55 (1980)(applying *Boyd*, but concluding that the proceeding in which the penalty was imposed was not "quasi-criminal" as that term is used in *Boyd*.).

This motion and the related civil action seek to prevent defendants from violating Judge Porteous' Fifth Amendment right not to be compelled to be a witness against himself. The defendants have violated this right, and continue to do so, through their use of Judge Porteous' immunized testimony in pursuing his impeachment and removal from office. In order to protect his Fifth Amendment rights and to preserve the protections of the immunity conferred upon him by the Fifth Circuit pursuant to § 6002, Judge Porteous asks this Court to enter a temporary restraining order and preliminary injunction restraining and enjoining defendants, in their capacity as Counsel to the Impeachment Task Force, from using his immunized testimony in any way, whether direct or indirect, evidentiary or non-evidentiary, in connection with the work of the Impeachment Task Force.

2. Factual Background

For approximately nine years the United States Department of Justice (the "Department"), through the Public Integrity Section of the Criminal Division, conducted a criminal investigation of Judge Porteous. The investigation concluded without the filing of criminal charges. Despite its decision to decline to bring charges, on May 18, 2007, the Department submitted a formal complaint of judicial misconduct to Edith H. Jones, Chief Judge of the United States Court of Appeals for the Fifth Circuit ("Chief Judge Jones").

This letter led to the appointment of a Special Investigatory Committee (the "Special Committee") to investigate the Department's allegations of judicial misconduct. The Special Committee held a hearing on October 29, 2007, at which Judge Porteous was called as a witness by counsel to the Special Committee. The Special Committee obtained a compulsion order and Judge Porteous' testimony was compelled under a grant of statutory immunity pursuant to 18 U.S.C. § 6002. While testifying under the immunity order, Judge Porteous answered numerous questions relating to the allegations of judicial misconduct in the complaint, resulting in a transcript of more than 125 pages.

Based upon the hearing, the Special Committee issued a report to the Judicial Council of the Fifth Circuit (the "Judicial Council"), concluding that Judge Porteous had committed misconduct that might constitute one or more grounds for impeachment. This report was accepted and approved by a majority of the Judicial Council, while a minority of judges filed a dissenting report. These reports were forwarded to the Judicial Conference of the United States (the "Conference"), and on June 17, 2008, the Conference transmitted a certificate to the Speaker of the House expressing the Conference's determination that consideration of impeachment of Judge Porteous might be warranted.

On September 17, 2008, the House of Representatives of the 110th Congress passed House Resolution 1448. This Resolution provides that the Judiciary Committee shall inquire whether the House should impeach Judge Porteous. This was followed by the engagement of Alan I. Baron as Special Counsel to lead an inquiry into Judge Porteous' impeachment. On January 13, 2009, the House of Representatives of the 111th Congress passed House Resolution 15 which continued the authority of House Resolution 1448 of the 110th Congress, in order to permit the work of the Impeachment Task Force to continue.

Since that time, defendants Alan I. Baron, Mark Dubester, and Harold Damelin have been reviewing the materials provided by the Fifth Circuit, including the Special Committee Report, the hearing testimony, and other information. In their official capacity as counsel to the Impeachment Task Force, defendants have received the immunized testimony of Judge Porteous but have failed to implement measures designed to prevent the immunized testimony from being used against Judge Porteous, as is typical when a subsequent prosecution is brought against an individual who has provided testimony under a grant of immunity.

Defendants have reviewed the immunized testimony and made use of it in determining the course of the impeachment investigation, in interviewing witnesses, and in considering what additional evidence to seek or what investigative leads to pursue. Upon information and belief, defendants have published Judge Porteous' immunized testimony by exposing potential witnesses to the testimony or its contents, either through the questioning of these witnesses based upon Judge Porteous' testimony or by seeking the witnesses' reaction to his testimony. *See* Declaration of Richard W. Westling in Support of Motion for Temporary Restraining Order and Preliminary Injunction, dated October 12, 2007 (Attached as Exhibit "1").

3. Applicable Law and Argument

a. The Standard for Injunctive Relief

The U.S. Court of Appeals for the District of Columbia has adopted a four-part test for granting a preliminary injunction. The Court must weigh:

> (1) whether the plaintiffs have demonstrated that there is a substantial likelihood that they will prevail on the merits on one of their claims; (2) whether the plaintiffs have shown that they will sustain irreparable harm if injunctive relief is not awarded; (3) whether the issuance of injunctive relief will not "substantially harm" the other parties; and (4) whether awarding the relief is in the public interest.

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). The factors "must be viewed as a continuum, with more of one factor compensating for less of another. If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 77-78 (D.D.C. 2003) (internal citation and quotations omitted). Issuing an injunction may be justified "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.* at 78 (internal citation and quotations omitted). In this case, Judge Porteous has a very high likelihood of success on the merits and also meets the remaining three elements of the test.

b. Judge Porteous is Likely to Succeed on the Merits

i. The Fifth Amendment Claim

The Fifth Amendment's privilege against compulsory self-incrimination provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Kastigar v. United States*, the Supreme Court considered whether the government could compel a witness to testify "by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use immunity')" without violating the witness' Fifth Amendment rights. 406 U.S. 441, 443 (1972). The Court held that use and derivative use immunity conferred under 18 U.S.C. §6002 – the same type of immunity conferred on Judge Porteous – "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege." *Id.* at 453.[1]

The Court noted that where an individual can demonstrate that he has given immunized testimony, prosecutors:

> have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. ... This burden of proof, which we reaffirm as appropriate, in not limited to the negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460 (citations omitted).

[1] The Fifth Amendment and the immunity order in this case both provide protections in a "criminal case." As discussed in Section 3(b)(ii) below, however, the Fifth Amendment's privilege against self-incrimination has also been extended to quasi-criminal cases and, accordingly, under *Kastigar*, the reach of the immunity statute and the immunity order in this case must be coextensive with the Fifth Amendment.

Under *Kastigar*, the first requirement for obtaining relief and, thereby, protection of an individual's Fifth Amendment right, is to demonstrate that the individual provided immunized testimony. This is clearly established here. *See* Immunity Order, dated October 5, 2007 (Attached as Exhibit "2") and Transcript of Testimony of G. Thomas Porteous, Jr. before the Special Committee (Attached as Exhibit "3"). This showing alone is sufficient to trigger the prosecution's "heavy" burden under *Kastigar* to show affirmatively that its effort to impeach Judge Porteous rests on independent and untainted evidence.

ii. Impeachment is Quasi-Criminal

It is anticipated that the defendants will argue that the ruling in *Kastigar* is limited to criminal prosecutions in the criminal courts and that it has no application to an impeachment proceeding before Congress. The Supreme Court, however, has placed no such limits on the Fifth Amendment's protection against compelled self-incrimination. Indeed, the Supreme Court has held that the contours of the Fifth Amendment protection against compulsory self-incrimination are not limited to traditional criminal prosecutions; rather they extend to quasi-criminal proceedings which involve the imposition of punishment on an individual "by reason of offenses committed by him, which though they may be civil in form, are in their nature criminal." *See Boyd*, 116 U.S. at 633-34; *see also Lees*, 150 U.S. at 480-81; *United States Coin & Currency*, 401 U.S. at 718; and *Ward*, 448 U.S. at 251-55.

There is, perhaps, no clearer example of a quasi-criminal proceeding than the impeachment of a civil officer under the Constitution. As a noted constitutional scholar has observed "[i]mpeachment is a quasi-criminal affair, in which the Senate, sitting as a court, is asked to convict the defendant of high criminality or gross misbehavior in a trial designed not merely to remove but also to stigmatize the offending officeholder." Akhil Reed Amar,

Impeaching Presidents, 28 HOFSTRA L. REV. 291, 307 (1999). *Compare Hastings v. United States Senate Impeachment Trial Committee*, 716 F. Supp. 38, 41 (D.D.C. 1989)(holding that for Double Jeopardy purposes an impeachment is not a criminal proceeding and finding that impeachment trials are sui generis).

The view that impeachment is quasi-criminal finds significant support in the text of the Constitution itself. First, Article II, Section 4 provides that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." U.S. Const. art. II, §4. This provision clearly reflects the quasi-criminal nature of the impeachment process. That the offenses supporting impeachment are grave offenses (even though they are not necessarily limited to indictable offenses) supports the view that liability in an impeachment is based upon criminal acts. Second, Article I, Section 3 provides that "[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. art. I, § 3. This clause also supports the view of impeachment as quasi-criminal in its reference to "conviction" and in permitting punitive measures including removal from office and disqualification to hold office in the future. Finally, Article III, Section 2, provides that "[t]he Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. art. III, §2. Here, the Constitution makes clear that trials in cases of impeachment will be a "trial of a crime" but will be exempted from the requirement of a

trial by jury. In light of its quasi-criminal character, Supreme Court precedent supports the view that the Fifth Amendment's protection against compulsory self-incrimination applies to an impeachment proceeding. As a result, the principles in *Kastigar* should apply to the use of Judge Porteous' immunized testimony.

iii. The Speech and Debate Clause

A threshold issue to the ability of Judge Porteous to succeed on the merits of his claim is a determination as to whether this action is barred by the Constitution's Speech and Debate Clause. The Clause provides that: "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, §6, cl. 1. This clause has been interpreted to provide immunity to Members of Congress and their staff for actions "that fall within the sphere of legitimate legislative activity." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). The Supreme Court has noted that:

> In determining whether particular activities other than literal speech or debate fall within the legitimate legislative sphere we look to see whether the activities took place 'in a session of the House by one of its members in relation to the business before it. More specifically, we must determine whether the activities are an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.
>
> The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.

Servicemen's Fund, 421 U.S. at 503-504 (internal quotations and citations omitted). Here, while no legislation is contemplated, the House is involved in an impeachment inquiry and, clearly,

impeachment is another matter "which the Constitution places within the jurisdiction of either House." *Id. See also Hastings v. United States Senate Impeachment Trial Committee*, 716 F. Supp. 38, 42 (D.D.C. 1989)(holding impeachment falls under the Speech and Debate Clause).

While the impeachment process may be protected by the Speech and Debate Clause, as with any other assertion of the Clause, its protections are not absolute. In this suit challenging a constitutional violation during an impeachment inquiry, the corollary to the Supreme Court's reference to the "legitimate legislative sphere" is that the action complained of must be within the "legitimate impeachment sphere" in order for the action to be protected by the Clause. Based on this precedent, the question for this Court is whether the use of immunized testimony in violation of an individual's Fifth Amendment self-incrimination right can ever be a "legitimate" activity for Congress, whether undertaken as part of its power to legislate or to impeach.

The Supreme Court has published language that seems to mandate otherwise. For instance, in *Gravel v. United States*, 408 U.S. 618 (1972) that "no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.* at 621. As pointed out in *Servicemen's Fund*, the actions referred to in this passage were not essential to legislating and could easily be contrasted with the routine subpoena for information which confronted the *Servicemen's Fund* Court. Nor can it be argued that failing to protect against the improper use of Judge Porteous' immunized testimony or that its publication to witnesses is essential to impeaching. Indeed, prosecutors are regularly confronted with the problem of prosecuting a witness who has received

statutory immunity and have learned to put measures in place to protect against the improper use of such testimony. *See e.g., Untied States v. North,* 920 F.2d 940, 942-3 (D.C. Cir. 1990).

More recently, the District of Columbia Circuit noted that the Speech and Debate Clause "privilege permits Congress to conduct investigations and obtain information without interference from the courts, **at least when these activities are performed in a procedurally regular fashion**." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995)(emphasis added). While the Clause confers immunity on Members of Congress for all actions "within the legislative sphere, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to the criminal or civil statutes," the Clause "is not, to be sure, a blanket prohibition on suits against congressmen" or their staffs. *Id.* at 415. "Closely related – indeed a corollary – to this right to pursue investigations is Congress' privilege to use materials in its possession without judicial interference. In this context, the privilege operates to insulate materials held by Congress from claims based on actions or occurrences other than Congress' present use." *Id.* at 416-17 (internal quotations and citations omitted). The Court noted that:

> The law is clear that even though material comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity. Although Members and (more likely) their agents can be held accountable for illegal seizures, that does not affect Congress' privilege to use illegally seized materials, so long as that use is consistent with legislative purposes. Uses that fall outside the confines of legislative action, however such as the dissemination of investigatory information outside Congress are not protected.

Id. (internal quotations and citations omitted).

Judge Porteous' action is not based upon the Congress' receipt of the immunized testimony; rather it is based upon the "present use" of those materials by counsel to the Impeachment Task Force in violation of Judge Porteous' Fifth Amendment rights. This use is not within the "legitimate impeachment sphere" nor is it "essential to impeaching." While the protections afforded by the Speech and Debate Clause are broad, there is no prior case holding that where the "use" itself violates a constitutional right there is absolute immunity from suit. In all the cases cited, the courts were called upon to determine whether the actions complained of were committed by congressional staff as part of the "legitimate" or "essential" function of one of the Houses. Judge Porteous suggests that the use of immunized testimony in violation of the Fifth Amendment cannot be deemed part of the legitimate impeachment function and, as a result, the Speech and Debate Clause should not bar this suit.

iv. Justiciability

Defendants will doubtless attempt to avoid consideration of this case by claiming that all issues related to impeachment are nonjusticiable under the political question doctrine. *See Nixon v. United States,* 506 U.S. 224 (1993); *see also Hastings v. United States Senate Impeachment Trial Committee*, 716 F. Supp. 38, 43 (D.D.C. 1989)(holding senate trial procedures were non-justiciable).[2] While the Supreme Court's ruling in *Nixon* did find that the procedures used by the Senate to try a federal judge where not subject to review by the Court, the issues raised here

[2] The district court's ruling in *Hastings* was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in an unpublished opinion. *See Hastings v. United States Senate*, 887 F.2d 332, 1989 WL 122685 (D.C. Cir., Oct. 8, 1989). The District of Columbia Circuit, while affirming the district court, did not find the matter was non-justiciable. The Court based its decision on problems of ripeness and prematurity, and upon the lack of precedent supporting the issuance of injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch. In contrast, here Judge Porteous is not seeking to enjoin the proceedings of the legislative branch, rather he is seeking to enjoin violations of his constitutional rights that are occurring, and which will continue to occur, because of Impeachment counsels' use of his immunized testimony to further the impeachment process.

do not fall under the ruling in *Nixon*. The ruling of nonjusticiability in *Nixon* relied on the concept of "textual commitment" which the Supreme Court expressed as:

> A controversy is nonjusticiable – i.e., involves a political question – where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ." *Baker v. Carr*, 369 U.S. 186, 217 (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. *See ibid.; Powell v. McCormack*, 395 U.S. 486, 519 (1969). As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

Nixon, 506 U.S. at 228-29. Here there is no textual commitment of the Fifth Amendment right against compulsory self-incrimination. Article I, Section 2 of the Constitution vests the power of impeachment solely in the House of Representatives and Article I, Section 3 provides that the Senate has the sole power to try all impeachments. However, these textual provisions do not suggest that the Congress alone is constitutionally committed to determining if an individual's Fifth Amendment rights have been violated based upon the government use of his immunized testimony in an attempt to impose a punishment in a quasi-criminal proceeding. Moreover, the determination and vindication of the self-incrimination rights guaranteed by the Fifth Amendment are clearly not the types of questions for which there is "a lack of judicially discoverable and manageable standards to be used for resolving it." *Id.*

Judge Porteous' claim is based upon the improper use of his immunized testimony in violation of his Fifth Amendment rights. This violation has occurred, and will continue to occur,

while defendants, in their capacity as counsel to the Impeachment Task Force, make direct and indirect use of his immunized statements in pursuing the quasi-criminal impeachment process. Because he has established a constitutional violation and is likely to succeed on the merits, injunctive relief is appropriate in this matter.

c. Judge Porteous Will Sustain Irreparable Harm

"It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (*quoting Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Here, Judge Porteous is subject to a continuing infringement of his rights under the Fifth Amendment in the absence of injunctive relief. Moreover, given the anticipated commencement of hearings by the Impeachment Task Force on November 17, 2009 it is imperative that this Court order injunctive relief to prevent continuing use of the immunized testimony. Further, if the Court fails to act and to preserve the status quo pending a review of Judge Porteous' constitutional claims, the impeachment process will likely moot any pending review. While Judge Porteous suggests that this Court can determine the extent of any violation of his Fifth Amendment rights at this point in time, it is also clear that the legacy of *Nixon v. United States* is to deny any post-hearing consideration of his constitutional claims in the event he is impeached and removed from office based, in part, upon the use of his immunized testimony.

d. Injunctive Relief Will Not Substantially Harm Defendants

While defendants will claim that they will be harmed by the entry of a temporary restraining order or a preliminary injunction, any such harm will be limited to a delay in the proceedings while Judge Porteous' constitutional claims are considered by the Court. Defendants clearly have a right to pursue their impeachment inquiry of Judge Porteous

expeditiously and efficiently. However, their right to do so does not trump Judge Porteous' right to have his Fifth Amendment rights protected. While this litigation may be the source of some temporary delay, it will not prejudice the defendants except to the extent that a ruling limiting the use of the immunized testimony and protecting Judge Porteous' constitutional rights may have an impact upon their ability to further the impeachment inquiry.

e. Injunctive Relief Is in the Public Interest

The public has an interest in having the courts ensure that the individual rights guaranteed by the Constitution are protected. *See, e.g., G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1079* (*citing Gannett Co., Inc, v. DePasquale,* 443 U.S. 368, 383 (1979)). The public interest is also served by allowing the defendants to expeditiously conduct a full and fair impeachment inquiry into the allegations against Judge Porteous. However, the public interest is clearly not served where the tension between protecting individual rights and expedition in pursuing the impeachment inquiry is resolved by deferring to expediency at the expense of constitutional rights. Because pursuit of the impeachment inquiry can only be in the public interest where that inquiry is conducted in a manner which is entirely consistent with Judge Porteous' constitutional rights, thereby ensuring public confidence in the process and its result, injunctive relief here is in the public interest.

4. Conclusion

For these reasons, the Judge Porteous requests that the Court issue an order:

(1) granting a temporary restraining order and preliminary injunction enjoining defendants, in their capacity as counsel to the Impeachment Task Force, from making any use of Judge Porteous immunized testimony, whether direct or indirect, evidentiary or non-evidentiary, in connection with the impeachment inquiry; and

(2) setting an adversary hearing to determine the extent of any prior use of Judge Porteous' immunized testimony in order to fashion an appropriate form of injunctive relief to protect Judge Porteous from any and all past violations of his constitutional rights.

Respectfully submitted,

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